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ARTICLES

The Range Cattle Industry: Its Effect on Western Land Law

Valerie Weeks Scott*

The open range cattle industry operated extensively in the western United States¹ between 1864 and 1900. Unlike the technologically-dependent industries that developed in the eastern United States during the 19th century, the cattle industry was based upon thousands of square miles of unoccupied free land, an animal already adapted to its environment, and the pioneer spirit of its builders. It fostered a culture and a way of life on the grass-covered plains that is unique in the history of the United States and that is still very much a part of the American people.

Because the physical conditions of the frontier reduced man to a primitive existence, he was able to free himself from the legal and social traditions that had bound him in civilized areas. He was able to form his own set of values and beliefs about how much respect was due private and official power.² The value developed most extensively and prized most highly on each frontier was that of individualism, the right to act alone and be alone. This kind of individualism resulted in a lack of solid social institutions or restraint and new, simple kinds of rules and laws.³

On the Great Plains this kind of individualism in the frontiersmen was encouraged by the extraordinary wealth of land and other natural resources that produced such great economic benefit. One example of the result of this kind of individualism was total disregard for what federal land laws there were. "The bona fide settler, himself, by reason of his proprietary rights in the pre-emption and homestead systems, expressed in his own movements these characteristics. The idea has held full sway that the Public Domain was to be used for individual and private rather than for general social welfare. As a result, it has been a constant struggle in the Land Office to protect the interests of the whole public against the operations of individuals who have sought to profit at public expense."⁴

And yet the dichotomy of the American frontiersman was that, while pursuing his own ends alone without restraint, he had a ready capacity

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¹WEBB, THE GREAT PLAINS 207 (1959), states that the grazing lands encompassed the area now composed of the following states: Texas, Oklahoma, Kansas, Nebraska, North and South Dakota, Montana, Wyoming, Nevada, Utah, Colorado and New Mexico. This paper will include primarily discussions of the law and industry in the states east of the Rocky Mountains.

²HURST, THE GROWTH OF AMERICAN LAW 7-8 (1950).

³HILL, THE PUBLIC DOMAIN AND DEMOCRACY 143 (1910).

⁴*Id.* at 141.

to supplement his individual action with extra-legal voluntary associations to further his own and thus the ends and needs of the group. So there developed the log-rollings, house-raising, husking bees, squatters' associations to protect against land speculators, camp meetings, vigilantes, cattle-raiser's associations and "gentlemen's agreements."⁵

The actions of such voluntary associations often had authority similar to that of formal law. Such actions were not evidence of a disrespect for law or order, but were the only means by which real law and order were possible in a region where settlement and society had advanced beyond the institutions of organized society.⁶ The American historian, Frederick Jackson Turner wrote: "...in all America we can study the process by which in a new land social customs form and crystallize into law."⁷

The cattle industry developed outside the law. Once established, its participants began to look to the law for formalization and protection of their interests. As the needs of the industry required, the cattlemen made and enforced their own rules as to the land, their cattle, and their own conduct. The influence these rules had on western land law as it developed with the coming of permanent settlers is the subject of this paper.

I. THE PROBLEM OF ACQUIRING RANGE LAND

A. UNITED STATES LAND LAWS

The open range cattle industry was based on the availability of hundreds of thousands of square miles of free and unoccupied public domain. The federal government got title to most of this land when it bought the "Louisiana Purchase" in 1803. Little attention was paid to the western portions of the tract, as the federal government was interested in getting farmers into the eastern fringes and gaining revenues from the sale of the lands. By the middle of the century, the population had pushed far enough west for Congress to consider expanded measures to deal with its desire to settle the western portion of the public domain.⁸ Starting with the Preemption Act of 1841, Congress devised four formal ways for farmers to obtain land in the West.

1. Under the Preemption Act of 1841,⁹ The last of the sixteen preemption acts passed between 1801-1841, one could acquire title to 160 acres of land after settling and building a dwelling on it. A price of \$1.25 an acre was charged, and the Act applied only to surveyed lands. After 1862, the Act applied to unsurveyed lands. It was repealed in 1891.¹⁰

⁵TURNER, *THE FRONTIER IN AMERICAN HISTORY* 343-4 (1950).

⁶*Ibid.*

⁷*Id.* at 343.

⁸WEBB, *op. cit. supra* note 1, at 399.

⁹5 Stat. 453 (1841).

¹⁰HIBBARD, *A HISTORY OF PUBLIC LAND POLICIES* 158 (1965).

2. The Homestead Act of 1862¹¹ answered the dream of Americans for free land. Under this act a citizen over 21 got 160 acres by settling on unoccupied public domain and making certain improvements, such as cultivating a good portion of it and building a dwelling. The Act applied only to surveyed lands, and land acquired under it could be transferred. Title was perfected in the homesteader after five years, or he could pay \$1.25 per acre after six months and take title at that time.¹² The following number of entries were made and titles taken under the Homestead Act between 1862 and 1884.¹³

ORIGINAL ENTRIES			FINAL AWARDS	
	<i>No. of Entries</i>	<i>Acres</i>	<i>No. of Entries</i>	<i>Acres</i>
Colorado	11,154	1,566,184	4,406	618,470
Dakotas	88,880	13,741,654	12,100	1,804,924
Kansas	94,032	12,770,450	42,359	5,865,088
Montana	33,592	53,721	970	139,258
Nebraska	77,943	10,211,772	33,503	4,183,117
New Mexico	2,939	439,737	1,408	210,553
Wyoming	927	131,706	197	24,026

The significant factor in these figures is the great number more original entries made by farmers, ranchers, and speculators who never took final title, either because the land was unfarmable or they had used the land as much as they wanted within the five years. Also, many entries were fraudulent and never finalized.

3. A settler received free 160 acres under the Timber Culture Act¹⁴ of 1873 if he planted one quarter of it in timber. Title was perfected in eight years. The Act was repealed in 1891.¹⁵ Below are the statistics for the amount of land taken under this Act between 1878 and 1885.¹⁶

ORIGINAL ENTRIES			FINAL AWARDS	
	<i>No. of Entries</i>	<i>Acres</i>	<i>No. of Entries</i>	<i>Acres</i>
Colorado	2,414	347,719		
Dakotas	42,667	8,246,304		
Kansas	24,666	3,938,040		
Montana	1,371	180,509	None were finalized by 1885	
Nebraska	25,031	3,553,479		
New Mexico	377	51,856		
Wyoming	448	63,030		

¹¹12 Stat. 392 (1862).

¹²H.R. Ex. Doc. No. 47, 46th Cong., 3rd Sess. 355 (1880-81).

¹³H.R. Ex. Doc. No. 267, 48th Cong., 2nd Sess. 177 (1884-85).

¹⁴17 Stat. 605, amended 18 Stat. 21 (1874).

¹⁵WEBB, *op. cit. supra* note 1, at 412.

¹⁶*Supra* note 13, at 178.

4. Under the Desert Land Act of 1877¹⁷ it was possible for a settler to buy 640 acres at \$1.25 an acre if he irrigated part of it before taking title in three years. The purchaser could occupy the land for three years at 25 cents an acre before having to pay the additional one dollar per acre at the end of that time. The Act applied to all the states on the Great Plains, as well as those farther West, with the exclusion of Kansas, Nebraska, Colorado (until 1891), Indian Territory (Oklahoma) and Texas.¹⁸ Amended versions of the Desert Land Act and the Homestead Act are still in force. Below are the statistics for land acquired under the Desert Land Act between 1877-1884:¹⁹

ORIGINAL ENTRIES			FINAL AWARDS	
	<i>No. of Entries</i>	<i>Acres</i>	<i>No. of Entries</i>	<i>Acres</i>
Dakotas	22	18,101	1	300
Montana	1,294	482,281	262	72,598
New Mexico	429	121,307	16	5,247
Wyoming	1,904	774,096	138	41,030

The federal government also sold lands piecemeal when the President opened the lands for sale by proclamation. The lands were sold at auction to the highest bidder above a minimum price of usually \$1.25 an acre. When all such lands were not sold by auction, they remained for sale at the established price in any quantity.²⁰ Although most of these lands were in the Middle West, selected lands were sold by this method on the Great Plains.

In addition to these methods of acquiring land from the federal government, land could be purchased from the states, to which the federal government had donated hundreds of thousands of acres of public domain for the use of education and internal improvements. Land could also be purchased from the railroads. Between 1850 and 1871 Congress gave away enormous amounts of public domain to encourage railroad building. During this time 181,000,000 acres were granted railroad corporations. Of this amount 131,350,534 acres were given directly, largely to the trans-continental lines in the form of ten to forty alternate sections for each mile of track laid. The other 49,000,000 acres were granted through states, or in the case of Texas, by the state itself. Also, 840,000 acres were given, in addition, by local governments, towns, and individuals.²¹ These lands were some of the best in the west. Much of the land sold by the states and railroads went to speculators who profited vastly from their resale to settlers who wanted prime land, not government leftovers.

¹⁷19 Stat. 377 (1877).

¹⁸WEBB, *op. cit. supra* note 1, at 412-14.

¹⁹*Supra* note 13, at 178.

²⁰*Supra* note 13, at 41-42.

²¹BILLINGTON, *WESTWARD EXPANSION* 699 (1960).

B. ACQUISITION AND CONTROL OF RANGE LAND

Between 1865 and 1900 the land laws and policies of the United States government did not permit the rancher legally to acquire enough grazing land to operate a profitable beef raising business. According to the government policy, the public domain was open to everyone equally for grazing purposes. Yet because the federal government was largely unable to enforce its laws and policies in the still unsettled Great Plains area, ranchers were able to appropriate as much public domain as they needed. Eventually many of the land acquisition practices of the ranchers were given legal recognition in state and local laws.

The physical characteristics of the Great Plains—flat land, absence of timber, and deficiency of rainfall—dictated the need for a larger economic unit of land than in eastern farming areas. A farmer on the Great Plains needed from 360 to 640 acres of land; if he irrigated all his land, he needed only from 40 to 60 acres. A rancher needed from 2,000 to 50,000 acres of land upon which to graze his cattle.²²

Congress and the executive department officials could never really understand the different needs of the western farmer or cattlman. Although the range cattle industry early attracted the interest of the federal government, the rapid growth of the industry gave government officials little time to become familiar with its technical details. As a result, legislation and departmental orders with respect to the cattle business showed no clear conception of the rancher's problems. Equally so, Congress was not interested in the cattleman and his methods, but only in preparing the Great Plains area for the farmer. The following opinion of a government official reflects the farmer bias prevalent in Washington:

. . .the immense herds of cattle which are now spread over a large part of the Western and Northwestern Territories graze chiefly upon public lands of the United States, but merely by sufferance and not by virtue of any grant, or expressed permission from the Government. The laws of the United States in regard to the disposition of the public lands constitute a barrier to the purchase of such lands in quantities sufficiently large for the conduct of the range and ranch (sic) cattle business. This has resulted from the fact that the public sentiment of this country is and has always been strongly opposed to the disposition of the public lands in large quantities, either to one person or to corporations. The genius of our institutions is in favor of comparatively small holdings of land, and the result of practical experience under this policy since the first settlement by colonists upon our shores, has caused it to become a cherished feature of our method of disposing of the public lands.²³

Before the cumbersome machinery of government could be set in motion, the pioneer ranchers and farmers adapted themselves to a suitable land use system, defied and evaded laws, and set up an extra-legal system of landholding. They were confronted with prior law on the one hand and necessity on the other. Practice or custom first worked out a new land system and the law cautiously followed after.

²²*Supra* note 13, at 96.

²³*Supra* note 13, at 41.

1. *By Homestead or Purchase.*

A rancher would ordinarily use the federal land laws to the best advantage he could. Under the Homestead Act he could take title in five years to 160 free acres surrounding his ranch house. Under the Pre-emption Act of 1841 he could get title to 160 more, as well as title to 160 free acres under the Timber Culture Act and 640 acres under the Desert Land Act in some states. These lands he would usually fence and use as pasture for horses, corrals and hay lands. In addition, if he could get other members of his family or cow hands to take title to additional lands under the same acts, he could amass, more or less legally, several thousand acres of land. It was impossible for him ever to buy or take legal title to enough land upon which to graze his cattle. Consequently, the cattle were turned out to graze on the public domain.²⁴

If ranchers could afford it, they could buy adequate amounts of grazing lands from the states or railroads. This method of acquisition was generally open only to large cattle corporations and very wealthy individuals. In 1882 the Northern Pacific started selling its land grant sections, and in 1884 the Union Pacific sold two million acres of land in Wyoming alone. The terms offered by railroads were usually very easy. For example, the Union Pacific allowed payment by the ranchers over a ten year period in annual installments at six percent interest. Under this system range land could be obtained for a little more than 5 cents per acre per year. Because of the checkerboard arrangement of the railroad sections, if a rancher purchased 50 sections and fenced only his outside sections, he obtained control of 30 or 40 alternate government sections inside his fences. Thus, a rancher would obtain the use of two acres for every acre purchased.²⁵

Since the federal government was invariably unable to enforce its rights to the public domain sections thus enclosed, this method was long one of the ranchers' most successful devices for controlling large amounts of land. It did require that a rancher have a sizeable amount of cash.

2. *By Implied License From the Government.*

It was stated earlier that it was the policy of the United States government to allow the public domain to be used for grazing purposes, provided it was open to everyone desiring to use it. It was used at the "sufferance" of the government, as the Treasury Department official Joseph Nimmo put it in his report.²⁶ Thus, as long as there were not too many cattle grazing in one area or farmers settled across the range, the rancher had adequate public domain land. However, he had no guarantee how long the domain would remain unsettled or how long Congress would "suffer" the grazing, since it had never affirmatively condoned it.

²⁴DALE, THE RANGE CATTLE INDUSTRY 83 (1920).

²⁵OSGOOD, THE DAY OF THE CATTLEMAN 212 (1929).

²⁶*Supra* note 13, at 41.

Into this void the federal and state courts stepped to recognize and enforce this implied license from the federal government for the use of the grazing lands, at least until it was overruled. The courts were the only governmental agencies ever to affirmatively recognize stock growers' rights to the use of the public domain.

In *Buford v. Houtz*²⁷ the plaintiff was a cattle rancher owning over 20,000 head of cattle and 350,000 acres of land in Utah Territory, which he had purchased from the Central Pacific Railroad. He owned only odd sections of unfenced land, the alternate even sections being part of the public domain. The defendant was a sheep rancher who grazed his sheep on the alternate even sections of public domain. Thus his herds passed over the plaintiff's land and grazed on it while moving to the public domain sections. Plaintiff sought a declaration from the court that the defendant had no right on his land and an injunction to prevent the defendant from driving his sheep over the plaintiff's land, except on the public highways. On appeal, the United States Supreme Court held for the defendant and denied the plaintiff any relief.

The court recognized that the plaintiff was able to monopolize 900,000 acres of graze for his cattle by owning only 300,000 acres in alternate sections,²⁸ and rejected any theory of trespass on the plaintiff's land. Justice Miller said, "We are of the opinion that there is an implied license, growing out of the custom of nearly a hundred years, that the public lands of the United States, especially those in which the native grasses are adapted to the growth and fattening of domestic animals shall be free to the people who seek to use them where they are left open and unenclosed, and no act of government forbids this use."²⁹

He went on, ". . . it became a custom for persons to make a business or pursuit of gathering herds of cattle or sheep, and raising them and fattening them for market upon these unenclosed lands of the government of the United States. . . . Everybody used the open unenclosed country, which produced nutritious grasses, as a public common on which their horses, cattle, hogs, and sheep could run and graze."³⁰

"Upon the whole," Justice Miller summarized, "we see no equity in the relief sought by the appellants in this case, which undertakes to deprive the defendants of this recognized right to permit their cattle to run at large over the lands of the United States and feed upon the grasses found in them, while, under the pretense of owning a small proportion of the land which is the subject of controversy, they themselves obtain the monopoly of this valuable privilege."³¹

The decision hit at the heart of one of the most effective practices large ranchers had for appropriating the range for their exclusive use,

²⁷133 U.S. 320 (1890).

²⁸*Id.* at 325.

²⁹*Id.* at 326.

³⁰*Id.* at 327.

³¹*Id.* at 332.

but it was favorable to the small rancher or farmer who was occasionally forced off the range by the larger rancher.

3. *By Water.*

A rancher could control a whole range by selecting an area where there were only one or two sources of water, and buying title to the land containing the water. Thus, no one else would desire the land surrounding it for miles because there was no access to water. It was said that cattle could graze no further than six to eight miles from water, so that much good land between two streams was left vacant and useless. About 1875 it was discovered that artesian wells could be sunk, thus opening up much more range land to the wandering cattle.³²

A Colorado rancher testified to the importance of water as a means of controlling the use of range land before the Public Land Commission in 1879:³³

Wherever there is any water there is a ranch. On my own ranch (320 acres) I have two miles of running water; that accounts for my ranch being where it is. The next water from me in one direction is twenty-three miles; now no man can have a ranch between these two places. I have control of the grass, the same as though I owned it. . . . Six miles east of me, there is another ranch, for there is water at that place. . . . Water accounts for nine-tenths of the population in the West on ranches.

A good summary of the methods of land control through water rights was given in an 1885 report of Joseph Nimmo, official of the Treasury Department.³⁴

In certain sections the ownership of lands on both sides of streams has been secured for long distances by persons engaged in the cattle business. By this means they have acquired the use of extensive areas of range or public lands, the same being too far removed from other "water rights" for the grazing of cattle belonging to other persons. . . . In so far as possible, the herdsmen, in certain localities, have secured water rights under the homestead and pre-emption laws of the United States, and also by the purchase of the proved-up claims of settlers. It is believed, however, that to a considerable extent such acquisitions have been made in violation both of the letter and the spirit of our land-laws applicable to the public domain.

4. *By Range Right.*

Where control of grazing lands through control of the water was not entirely successful, the cooperation of ranchers on the same range usually was. When a rancher claimed one or both banks of a creek, he secured a "range right" to as much land as he claimed up and down the stream and to all the land running back to the "divide" or highland separating his stream from the next stream lying beyond. A range was

³²*Supra* note 13, at 24.

³³Quoted in OSGOOD, *op. cit.* *supra* note 25, at 184-85. See also H.R. EXEC. DOC. NO. 46, 46th Cong., 2nd Sess. 297 (1879-80).

³⁴*Supra* note 13, at 11.

usually thirty or forty square miles. This land was his, although he probably held legal title only to the land along the stream. Public opinion, backed by force, gave him the right to use it without fear of intrusion.³⁵ Range rights could be purchased simply by buying cattle on their usual range. Ranchers conceded that with the cattle went range privilege and good will.³⁶ The purchase of cattle on the range was a good method for a newcomer to enter an already settled range.

The system of range rights was an adequate system by which the ranchers appropriated and divided a certain range among themselves. However, as settlers and sheep ranchers began to settle nearby, the system broke down. Because it was extra-legal and violated the federal policy requiring the public domain be kept open for all comers, the courts were forced to invalidate such range rights when they kept newcomers out, but at the same time the courts did recognize the rights.

The Wyoming Supreme Court, in a 1905 decision, denied an injunction to cattle owners who were attempting to enforce their range rights.³⁷ Thirteen ranchers brought suit to enjoin defendant sheep ranchers from grazing sheep on their cattle range. The plaintiffs controlled their range by ownership of the land where springs and water existed but owned no extensive sections of land. The plaintiff cattlemen claimed they had been settled in the area longer than the sheepmen and that the sheep were ruining the range by treading grass out and eating roots. The court held for the defendants' rights to graze the public domain but spoke explicitly of the extra-legal growth of range rights:³⁸

No doubt, induced by the idea of self-protection and even more laudable sentiments, there existed in the range country among neighboring stockgrowers a sort of moral recognition of a prior and better right in the first occupants of any range, at least if the same was stocked to its fair capacity; though the moral obligation supposed to rest upon one owner of livestock not to turn his cattle or other stock upon his neighbor's range did not prevent the territory of a prior occupant from being more or less invaded, if not by former neighbors then by strangers or newcomers; and the more frequent disputes that have arisen in recent years, usually in consequence of the taking of sheep into what had theretofore been regarded or claimed as strictly cattle territory, have attracted the attention of the government so that now the question of suitable governmental control of the use of the public grazing lands is being agitated.

5. *By Priority of Right.*

A formal way of announcing the establishment of the cattleman's range rights was devised on the northern ranges during the early days of the cattle boom. Cattlemen hurrying into eastern Montana and central Wyoming often set up "claims" to land, just as miners had claimed mineral rights to land. Newspapers in these areas would run long

³⁵BILLINGTON, *op. cit. supra* note 21, at 681-82.

³⁶OSGOOD, *op. cit. supra* note 25, at 186.

³⁷Healy v. Smith, 14 Wyo. 263, 83 Pac. 583 (1905).

³⁸*Id.* at 282.

columns of land claims, such as the following from the *Glendive Times*, Glendive, Montana, April 12, 1884:³⁹

I, the undersigned, do hereby notify the public that I claim the valley branching off the Glendive Creek, 4 miles east of Allard, and extending to its source on the South side of the Northern Pacific Railroad as stock range.—(signed) Chas. S. Johnson.

6. *By Possession*

We have seen in the above examination of specific methods of control of range land that possession of the public domain was an important element. For instance, a rancher could not legally homestead, or maintain his range or priority rights to an area, unless he lived on and actively ranched the area. Even when a rancher wished to buy or homestead land, if it were unsurveyed, his only means of taking and holding the land was by possession.⁴⁰ And, of course, priority of possession, as suggested above, was all important. Courts almost universally held in favor of prior possessors on the public domain regardless of the claim of a later party.

The most important case in this area is *Atherton v. Fowler*, decided by the United States Supreme Court in 1877.⁴¹ The plaintiff brought suit in replevin for the value of hay that the defendant cut from land that plaintiff claimed was rightfully his. The plaintiff had made improvements to the land in question, which he lived on for some time and claimed under a Mexican land grant. The United States government later denied the validity of the land grant and took the land into the public domain. The defendant then attempted to take title to the land under the federal Preemption Act. In so doing he cut the hay. The plaintiff's right to damages for the cut hay depended upon the superiority of his rights to the land. The Court held for the plaintiff, stating that the defendant could not initiate a lawful preemption claim by the settlement or improvement of a tract of land where he had forcibly intruded upon the prior possession of the plaintiff. Therefore, the defendant was trespassing.

The right to make a settlement was to be exercised on unsettled land; to make improvements on unimproved land. To erect a dwelling house did not mean to seize some other man's dwelling. It had reference to vacant land, to unimproved land; it would have shocked the moral sense of the men who passed those laws, if they supposed that they had extended an invitation to the pioneer population to acquire inchoate rights to the public lands against trespass, by violence, by robbery, by acts leading to homicides, and other crimes of less moral turpitude.⁴²

This case is a prime example of the highest court of the United States enacting custom and practice into law, by a very strict reading of the Preemption Act. Although the lands in question were probably not

³⁹OSGOOD, *op. cit. supra* note 25, at 182-84.

⁴⁰2 STUART, FORTY YEARS ON THE FRONTIER 144 (1957).

⁴¹96 U.S. 513 (1877).

⁴²*Id.* at 519.

ranch lands, this case might have been used to support ranchers in their claims to rights on the public domain, if they were able to prove they had improved the land.

Two Nevada cases upheld the rights of the possessors of 160 acre tracts, even though they had no legal title or claim to the land, because they were settled upon and were improving the land.⁴³

An early Montana case foreshadowed the Supreme Court holding. In 1872 the Montana territorial court held that the defendant could not forcibly eject the plaintiff in possession from his land. The defendant did not claim any title to the land. The court stated:

The theory under which such titles are sustained is that the first appropriator does acquire title to the land he appropriates as against all persons but the government of the United States, and that should the government of the United States, or one under it, ever assert title to the property, he would have the absolute title.⁴⁴

An 1887 Dakota case limited *Atherton v. Fowler* to the protection of those in possession only against forcible entrants, and not peaceable settlers.⁴⁵ The plaintiff, who was a large rancher in the territory, brought suit to recover possession of 160 acres of public domain which he had filed a claim for under the Preemption Act in 1879. He had built a frame shanty, fenced a few acres, and plowed a few more. He had also built calf pens, and occasionally during the summer his cow hands occupied the shanty. It was reasonably clear that the rancher used this land as part of his summer range, because in the winter he moved his cattle to another range and went to live in town. During the winter of 1880 the defendant entered and built a house, far removed from the plaintiff's fences and shanty, where he and his family lived. He also plowed fifty-five acres and fenced part of the land. The federal territorial court held the defendant was the rightful possessor of the land, stating that *Atherton v. Fowler* did not extend to peaceable entry on uninclosed or unimproved land. It said that the plaintiff did not have the right as prior preemption to oust the defendant from any portion of the land, except that which he had actually settled upon and improved; the defendant did not occupy any of the land the plaintiff had ever actually possessed.⁴⁶

Thus, the federal courts went a long way to establish the rights of prior actual possessors against later entrants. In the Dakota case the holding went against the cattleman, but the courts were enacting the actual practice of the territories into law, rather than letting the formal statutory rights defeat possession.

⁴³*Stainger v. Andrews*, 4 Nev. 59 (1868); *Nickals v. Winn*, 17 Nev. 188, 30 Pac. 435 (1882).

⁴⁴*Parks v. Barclay*, 1 Mont. 514 (1872).

⁴⁵*Forbes v. Driscoll*, 4 Dak. 336, 31 Pac. 633 (1887).

⁴⁶*Id.* at 346.

7. *By Association.*

As already noted, when other means of controlling land were not possible or effective, control had to come through an understanding of the ranchers themselves. We have already seen the system of "range rights" and priority rights developed by the ranchers. Other methods often requiring joint action by ranchers through their stock growers' associations were also developed. Such associations could deny to a newcomer participation in local roundups, use of the common corrals, group protection against Indians and rustlers, thus effectively driving him off a range.

At least one association, in Montana, advertised its claim to a certain area on behalf of its members:⁴⁷

We, the undersigned stockgrowers of the above described range, hereby give notice that we positively decline allowing any outside party, or any party's herd upon the range, the use of our corrals nor will they be permitted to join in any roundup on said range from and after this date. Rocky Mountain Husbandman, July 19, 1883.

8. *By Irrigation.*

A rather interesting device for keeping settlers and farmers off grazing land was developed in Wyoming and the Dakotas about 1886. Ranchers formed irrigation or ditch companies under the state corporation laws and then diverted streams from their natural beds above settlers' lands. By this means the settlers' land became arid and they were forced out of the neighborhood. The ranchers thereby obtained exclusive use of watersheds and water for cattle.

In 1885 the Goshen Hole Irrigation Co. was formed in Wyoming. It had the power under state law to divert water from Fox, Box Elder, Cherry, Mountain Lion and other creeks.⁴⁸ In the next year a special agent for the General Land Office, a division of the Department of the Interior, reported that a corporation in Wyoming was diverting all the water from Rawhide Creek, thus forcing out legitimate downstream settlers and insuring exclusive use of an immense grazing area.⁴⁹ In all in 1885 there were thirty-six ditch companies incorporated in Wyoming.⁵⁰ Similar practices were reported in the Dakotas.

9. *By State Law.*

Every state in the Great Plains enacted into law the principles of the accustomed range. Although the purpose was to prevent theft, the effect was to lend state support to ranchers' rights on the federal public do-

⁴⁷Quoted in OSGOOD, *op. cit.* *supra* note 25, at 185-86.

⁴⁸PELZER, *THE CATTLEMAN'S FRONTIER* 188-89 (1936).

⁴⁹U. S. GENERAL LAND OFFICE, *ANNUAL REPORT OF THE COMMISSIONER* 471 (1886).

⁵⁰See *ANNUAL REPORT OF THE GOVERNOR OF WYOMING TO THE SECRETARY OF THE INTERIOR* 176 (1885).

main. These laws made it a crime to drive stock from their accustomed range, which was, of course, the range of the owner. Thus, by grazing cattle in a certain area, a rancher could indirectly gain a prescriptive right to that range over a newcomer who should attempt to come on the range.⁵¹

As in eastern states, each of the western states or territories provided for procedures by which land, even federal public domain, could be adversely possessed. Montana and New Mexico provided that if a settler occupied any piece of land for ten years without his right or title being questioned, at the end of that period his right to the land could never be questioned.⁵² The Oklahoma statute barred any action for the recovery of occupied land after fifteen years.⁵³ An action to recover land against an adverse possessor was barred after two years in Arizona,⁵⁴ and in North Dakota land adversely possessed could never be questioned.⁵⁵ These last statutes were designed, more than the others, to encourage immediate settlement and to protect the settler on the land he had taken. But in Arizona, which was still a territory, the settler or squatter could only adversely possess up to 160 acres, the limit under the federal Homestead or Preemption laws. And in North Dakota the settler did not effectively possess land unless he improved, cultivated, and enclosed.⁵⁶

Colorado law provided that registration in the county recorder's office would be presumptive evidence of the regularity of a claim in all legal proceedings in state courts⁵⁷ except as against the United States or anyone claiming from the United States. No claim for more than 160 acres was to be allowed. The federal Homestead Act requirements were stricter than the Colorado law, which in effect obviated the need for any notice of taking to the federal government. Of course, title gained by this form of adverse possession was good only in state court proceedings and could be defeated by anyone claiming under a federal patent.

⁵¹OSGOOD, *op. cit. supra* note 25 at 182-83.

⁵²MONTANA CIVIL CODE, 1895, §§ 1390-91; MONTANA CODE OF CIVIL PROCEDURE, 1895, § 486; N. MEX. COMP. LAWS § 1881 (1884).

⁵³OKLA. STAT. § 3888 (1893).

⁵⁴ARIZ. REV. STAT. §§ 2941, 2939 (1901).

⁵⁵N. DAK. REV. CODE §§ 5193-95 (1895).

⁵⁶N. DAK. REV. CODES § 5919 (1895). Many states also extended to such adverse possessors of land protection from interference by anyone other than the real owner of the land. A North Dakota law gave a right of action to a settler on federal land, where settlement was not expressly forbidden, for any injuries to the land and for recovery of possession of the land "as if he possessed a fee simple title to said lands." Thus, a rancher could sue if sheep trampled or settlers entered on his grazing land in a state court.

⁵⁷COLO. ANN. STAT. §§ 611, 3607-3613, 3614-16 (Mills, 1891); *Adkinson v. Hardwick*, 12 Colo. 581, 21 Pac. 907 (1889). A Colorado statute gave power to Colorado courts to hear claims to the occupation and possession of public lands, conceding the paramount title of the United States. Settlers who had registered their original claims with the county recorder could maintain trespass suits to protect their land. Section 3613 was construed to limit a plaintiff, acquiring rights to land only under the above state statute based on occupation, to remedies for trespass, ejectment, forcible entry or detainer but not replevin. The plaintiff had sued in replevin for the value of logs his neighbor had cut off of land he claimed.

By giving state legal recognition of possession of land by users, as against absentee owners, these states helped ranchers seeking grazing land by legitimizing to a certain extent their use of the land.

In Arizona, a plaintiff rancher brought an action of ejectment against an adverse possessor.⁵⁸ The plaintiff had improved the land, had possession, and had deeds of record obtained from the first possessor, although the land was acoutlly still part of the public domain. The court found for the plaintiff, holding that under state statutes,⁵⁹ only the United States could raise the defense that plaintiff did not have perfect title, and that public land could not be forcibly entered and settled when possessed and improved by others.

New Mexico provided that all public lands proper for pasture were reserved for that purpose and were declared pasture,⁶⁰ contrary to the federal policy of allowing grazing on public land but encouraging settlement.

Idaho law provided that the owner of sheep found grazing on the public domain within two miles of a house was liable for all damages to the land. A judgment for damages under this law was upheld by the United States Supreme Court⁶¹ on the ground that the state statute was a valid exercise of the police power by the state.⁶²

In summary, many of the state laws actually gave ranchers rights to graze on the public domain and in some cases even to use the land of absent owners. However, the state laws did not help ranchers acquire more land⁶³ as much as it aided them in maintaining their range rights against outside interference by anyone except the United States government.

10. *Fencing.*

From the beginning it was clear that the federal land laws and the needs of the western ranchers did not mesh. The range cattle industry was dependent upon vast amounts of open, free range. Eventually settlement and economic pressures choked off the industry from the free use of the abundant open range land. Perhaps the single most important physical factor affecting the close of the open range was the development and wide-spread use of fencing in the form of barbed wire.

As the agricultural frontier pushed west, more and more land disappeared from the public domain. Small farmers were encroaching on the once private domain of the cattle grower. The cattleman bought

⁵⁸Tidwell v. Chiricahua Cattle Co., 5 Ariz. 352, 53 Pac. 192 (1898).

⁵⁹*Ibid.*

⁶⁰N. MEX. COMP. LAWS § 2573 (1884).

⁶¹Bacon v. Walker, 204 U.S. 311 (1907).

⁶²*Id.* at 319-20.

⁶³OSGOOD, *op. cit. supra* note 25 at 190. See EXEC. DOC. No. 127, 48th Cong., 1st Sess. 2-18 (1883-84); PELZER, *op. cit. supra* note 48, at 194.

land, leased land and fenced land in an effort to control enough to support his herds and to raise hay for winter feeding.

As fences continued to be built, the ranchers naturally divided into two camps: free grass men versus fenced range men. Fences were essentially a farmers' product but the ranchers had been forced to adopt them in self-defense. Some ranchers began cutting the fences of their neighbors in the night. Violence erupted between the two groups of ranchers throughout the Great Plains. The fence-cutters were usually the small stockmen or farmers that were absolutely dependent on open range for their livelihood. They justified their actions because the fences mutilated their animals, closed off their water holes, and shut their cattle off from the public range. The states could and would do nothing about the fencing. Complaints about fencing practices piled high at the General Land Office in Washington. In 1883 the Secretary of the Interior wrote to the Secretary of Agriculture that he counseled that settlers should cut all fences around land they wished to settle.⁶⁴

In some states the violence became so bad state legislatures were forced to take action. A special legislative session in Texas passed laws opening roads through pastures, making fence-cutting a penal offense and the fencing of the public domain a misdemeanor.⁶⁵ Other states followed suit; many made fence-cutting a felony. Fencers were required to leave gates where necessary; they were forbidden to enclose entirely small landowners or to fence state or school lands. Although a few fence-cutters were prosecuted, they were rarely sent to jail by juries who felt wire-snipping was not that serious an offense.⁶⁶

In April of 1883 the Federal Land Commissioner issued a circular declaring that the fencing of public lands could not be tolerated where it obstructed a settler's entry.⁶⁷

In 1885 Congress forbade construction and maintenance of enclosures on public lands.⁶⁸ Violations of the law carried a penalty of a fine of \$1,000 and/or one year in jail. The United States attorneys were to put such cases at the top of their lists, but no suits were to be brought for fencing of less than 160 acres of the public domain without the permission of the Secretary of the Interior. Federal courts were to sit in equity and could issue injunctions to restrain violations of the act; fencing suits were to be given precedence on the court dockets. The President was empowered to use civil or military force to tear down the offending fences, if necessary.⁶⁹

There was an imposing list of violators and violations of the Act. Of the 193 cases of illegal fencing brought to the attention of the Gen-

⁶⁴OSGOOD, *op. cit. supra* note 52, at 192.

⁶⁵DALE, *THE RANGE CATTLE INDUSTRY* 110-11 (1920).

⁶⁶WEBB, *THE GREAT PLAINS* 316 (1959).

⁶⁷U.S. GENERAL LAND OFFICE, *ANNUAL REPORT OF THE COMMISSIONER* 30 (1883).

⁶⁸23 Stat. 321 (1885).

⁶⁹*Ibid.*

eral Land Office in 1885, 132 were located in twelve counties of Colorado. Prosecution of these cases was not easy because the problems of gathering evidence faced by the federal special agents were acute, in the face of the animosity of the big ranchers. In 1886, 375 cases were listed in the General Land Office involving over six million acres of land. Agents secured the removal of many of the fences and in thirteen court decrees, one million acres were restored to the public domain.⁷⁰ The number of illegal enclosures did not decrease in the following years.

In *U. S. v. Douglas William Sartoris Co.*⁷¹ the United States brought suit under the fencing act of 1885. The defendant was the grantee of the Union Pacific Railroad Co. and owned alternate sections some distance from the right of way. The defendant erected a fence along the edge of his odd-numbered sections, leaving a six inch gap where the fence jumped catty-corner to another section. In this fashion the company fenced in a great number of sections of public domain. It was clear that the defendant kept his fence completely on his property. It was equally clear that he had effectively blocked off the public domain as if he owned it. The court said the law of 1885 did not apply to fences on private land, and here the defendant had not erected fences on the public domain. If the plaintiff wanted to use its land, it could get an easement of necessity like a private owner. The dissent pointed out that the defendant had notice of the law and thought that the fence clearly violated the act.

The leading case in the federal courts was *Camfield v. U. S.*⁷² In 1896, the defendant had built a fence on alternate sections that he owned, thus enclosing 20,000 acres of public domain. The court said the 1885 fencing act clearly applied, and "disagreed" with the *Sartoris* case. The statute was a valid exercise of the government's police power to protect the land for settlers. It went on:⁷³

So far as the fences were erected near the outside line of the odd-numbered sections, there can be no objection to them; but so far as they were erected, immediately outside the even-numbered sections, they manifestly intended to enclose the Government's lands, though, in fact, erected a few inches inside the defendant's line. Considering the obvious purposes of this structure, and the necessities of preventing the enclosure of public lands, we think the fence is clearly a nuisance, and that it is within the constitutional power of Congress to order its abatement, notwithstanding such action may involve an entry upon the lands of a private individual.

State courts generally enforced the fencing act and after 1896 followed *Camfield*.⁷⁴ As late as 1905, however, the Wyoming Supreme Court refused to apply the *Camfield* decision on similar facts.⁷⁵ The plaintiff

⁷⁰U.S. GENERAL LAND OFFICE, ANNUAL REPORT OF THE COMMISSIONER 445 (1886).

⁷¹3 Wyo. 287, 22 Pac. 92 (1889).

⁷²167 U.S. 518 (1897), affirming 66 Fed. 101 (1895).

⁷³*Id.* at 525.

⁷⁴*Jastro v. Francis*, 24 N. Mex. 127, 172 Pac. 1139 (1918); *Caldwell v. Bush*, 6 Wyo. 342, 45 Pac. 488 (1896); *U.S. v. Bisel*, 8 Mont. 20, 19 Pac. 251 (1888). But see *U.S. v. Goodwin*, 7 Mont. 402, 16 Pac. 850 (1888).

⁷⁵*Anthony Wilkinson Livestock Co. v. McIlquham*, 14 Wyo. 209, 83 Pac. 364 (1905).

rancher brought suit to enjoin the defendant ranching company from building fence on its own land and thus blocking the plaintiff's cattle access from plaintiff's land to the public domain. The lower court enjoined the defendant from building the fences. The Supreme Court of Wyoming reversed the lower court and held that it could not enjoin the defendant from building fences on his land or give the plaintiff a right of way across the defendant's land. It regarded the defendant's motive as immaterial. The *Camfield* case had held the other way, ordering the removal of fences on private land that blocked access to the public domain. The Wyoming case was heavily in favor of the larger ranchers, and is a good example of bias that might have existed on the court in favor of the cattle interests in Wyoming, even so far as to ignore a United States Supreme Court holding.

The fencing act of 1885 and its enforcement flew full in the face of custom on the range. And it was only mildly successful. The great spaces posed a problem in fact finding. Evidence gathering was a tedious and unrewarding task. In those days of inaccurate recording, tracing the ownership of a piece of property was a difficult task. Ranchers were not friendly about breaking up their ranges, to say the least, and they banded together to keep their range rights.

C. COERCIVE AND ILLEGAL ACTIVITIES OF RANCHERS.

The most common abuse of the federal land laws was the fraudulent entryman. A rancher would get his cow hands or even create a "dummy" entryman to homestead or preempt 160 acres. The rancher would then buy the land from the cow hand for almost nothing. The cow hand would not actually fulfill the improvement and settlement requirements of the law but get a friend to swear that he had at the land office.⁷⁶

To aid in the filing of fraudulent land entries at the local land offices, ranchmen were often able to buy the assistance of government surveyors. The surveyors would survey prematurely large parts of cattle range. (Most public domain was not eligible for settlement under the federal land laws until it had been surveyed.) The rancher would then file a fraudulent entry on the land and buy it or keep others off by showing them his preliminary entry. The General Land Commissioner reported in 1885 that of twenty-two Colorado townships, the surveys in seven were wholly fraudulent and in the rest the surveys amounted to nothing.⁷⁷

Two cases finally reached the United States Supreme Court concerning the illegal entry practices under the Preemption Act.⁷⁸ In each case the United States had issued patents to the defendants for 160 acres or

⁷⁶THOMPSON, THEY WERE OPEN RANGE DAYS 145-46 (1946).

⁷⁷HILL, THE PUBLIC DOMAIN AND DEMOCRACY 192-93 (1910).

⁷⁸Moffat v. U.S., 112 U.S. 24 (1884); U.S. v. Minor, 114 U.S. 233 (1884). See also Colorado Coal & Iron v. U.S., 123 U.S. 307 (1887).

less of public domain. The General Land Office later discovered in both cases that the grantees had not fulfilled the requirements under the Act, such as improving and cultivating the land, or were fictitious patentees. Because title to the land had passed, the General Land Office invoked the equity power of the federal courts to cancel the patents. In each case the court did so. In each case the Supreme Court held that federal courts in an equitable proceeding could void a land title on the basis of fraud.

Justice Miller in *United States v. Minor*⁷⁹ explained that the General Land Office in administering the land laws was a passive salesman. It accepted the truthfulness of the settler's affidavit and held no adversary hearing or formal proceeding before the title passed. Because it was impossible for the land office to insure that applicants had fulfilled the conditions of the sale, the equitable remedy of cancellation of the patent should be open to it.

The problem was that most frauds against the General Land Office were never discovered, and such frauds became an easy way for ranchers to take legal title to lands. This abuse of the land laws has been described by a number of ranchers living during the period, as well as by struggling and potential settlers who wrote voluminously of this practice to the General Land Office in Washington.⁸⁰

A number of the different practices of the ranchers are set out in such letters from settlers to the General Land Office. Several times these letters were compiled by that office and sent in reports to Congress upon its request, about abusive practices of the ranchers. The abusive practices chronicled in these letters are as follows:

(a) Many letters spoke of the use of force by ranchers to scare farmers and settlers.⁸¹

(b) Some ranchers would offer to buy a farmer out, and destroy his crops if he refused.⁸²

(c) Large ranchers often attempted to keep smaller ranchers out of an area. They would rent portions of the public domain to late-coming ranchers and sheepherders. Then they might appropriate the stray cattle of the small rancher, who had no power to retaliate. Eventually, he would have to leave an area if he were to keep his herd intact.⁸³

(d) Some ranchers' associations used the device of claim-jumping. They would contest claims of settlers taking under the Homestead or Desert Land Acts, stating that an association member had made an earlier claim on the land when, in fact, he had not. The effect of this operation

⁷⁹*U.S. v. Minor*, *Supra* note 78, at 240-41.

⁸⁰BILLINGTON, *WESTWARD EXPANSION* 698 (1960); WEIS, *STOCK RAISING IN THE NORTH-WEST* 3 (1884); H.R. EXEC. DOC. NO. 232, 50th Cong., 1st Sess. 2 *et seq* (1887-88).

⁸¹H.R. EXEC. DOC. NO. 232, 50th Cong., 1st Sess. 6 (1887-88).

⁸²*Id.* at 8.

⁸³*Id.* at 9-10.

was to drive out the settler who couldn't afford the costs of witnesses, a record, and the other costs of proving his claim in a land office or court proceeding. There was almost no expense to the cattle association.⁸⁴ In Kansas and Nebraska farmers formed claim association to protect themselves against the cowmen, since the government could not.⁸⁵

(e) At times ranchers controlled or were influential in state legislatures. When it appeared that ranchers were to be held liable by courts for damage done by their cattle to farmers' land, they had state laws passed requiring farmers to fence their lands or ranchers wouldn't be liable for damage to crops. Most farmers couldn't afford fencing material, so their crops were often trampled by cattle.⁸⁶

(f) In Kansas, a rancher would bring stock into an area. His cow hands would claim land under the various federal acts and with money given them by the rancher buy the land after the legal six months waiting period. They would then transfer the land to the rancher, who would mortgage the land and pay the interest on the mortgage for a few years while he needed the range for stock. When he no longer needed the range he would stop paying the interest and the mortgagee would foreclose on the land. Consequently, the land passed into the hands of the speculator-lender and remained beyond the reach of the settlers.⁸⁷

The General Land Office had no power to enforce settler's claim under the federal land laws. It could only give away the land.⁸⁸ Although the General Land Office could not enforce the federal land laws once the title to the public domain passed to the settler, it did have jurisdiction over all proceedings concerning claims to the land prior to the passage of title and as to adverse claims after passage of title. These administrative procedures were long and costly. Often a settler lost his land, either because he couldn't afford to pursue his administrative remedy up to the Secretary of the Interior or because claim-jumping ranchers tied his land up in litigation for long periods of time. The easy remedy seemed to be to seek equity in the federal courts. But the Supreme Court held in two cases that federal courts could not adjudicate claims to the title of public land before the title passed from the United States.⁸⁹ Once the title had passed the federal courts would give relief to the claimant only in cases of mistake of fact, fraud, or mistake of law by the Department of the Interior; the findings of fact by that department were conclusive in all cases.

These holdings and complicated land office procedures gave the ranchers the advantage because they could use the land indefinitely

⁸⁴*Id.* at 10,11,17-19; DICK, *THE SOD-HOUSE FRONTIER* 124 (1954).

⁸⁵*Ibid.*

⁸⁶H.R. EXEC. DOC. No. 232, 50th Cong., 1st Sess. 12-13, 19-20 (1887-88).

⁸⁷S. EXEC. DOC. No. 127, 48th Cong., 1st Sess. 14 (1883-84).

⁸⁸H.R. EXEC. DOC. No. 232, 50th Cong., 1st Sess. 2 (1887-88).

⁸⁹*U.S. v. Stone*, 69 U.S. 525 (1865); *Marquez v. Frisbie*, 101 U.S. 473 (1879). See *Meador v. Norton*, 78 U.S. 442 (1870).

while it was tied up in litigation. Thus, by a number of devious and illegal methods, the ranchers were able to accumulate enough range land to make the industry profitable.

D. TEXAS LAND SYSTEM

Texas was the only state here discussed whose territory did not belong to the federal government prior to admission to the Union. When Texas became a state in 1845, it maintained the title to all its territory, was the source of all private land titles, and had complete power of disposal of the public lands within its territory. Texas built up a system of land disposal through which the state disposed of almost all of its land by 1920.⁹⁰

The Texas land system was based in part on the Mexican colonization laws of 1823 and 1825. It was the policy of the Mexican government to encourage American colonization of Texas. Under these laws it offered, on easy terms, 177 acres to farmers and up to 4,000 acres to ranchers. Under empresario laws it also entered into contracts with agents who guaranteed to bring into the Mexican province a certain number of settlers, each of whom received a guaranteed amount of land. Moses and Stephen Austin were the first empresarios to enter into such a contract. In 1836 when Texas declared its independence there were 350,000 square miles of land, of which title to only 25,000 acres had been conveyed.⁹¹

Pursuing the Mexican policy of colonization, the Republic, and then the State of Texas proved equally as generous with its land. The 1836 Constitution gave to all citizens of the state who were householders at the time of independence 4,500 acres or one league. These awards were known as "headrights."⁹² Conditional grants were extended to immigrants, who received 1,280 acres if they resided in Texas for three years, after which a permanent certificate was issued. A system of contracting with immigration agents, like the empresario system, was set up but abandoned in 1844.⁹³ Preemption and Homestead laws were also adopted. Under the Preemption law a settler could buy 160 acres at fifty cents an acre if he lived on it for three years. The first Homestead Law was passed in 1838 and was gradually enlarged until in 1866 the Constitution of Texas provided that every citizen had a right to 160 acres free as long as public land still existed. The homestead land ran out in 1898.⁹⁴

Because Texas had no other way to provide or encourage the building of internal improvements, it granted its land in especially large amounts to gain these things. Texas gave 32,400,000 acres of land to

⁹⁰McKittrick, *The Public Land System of Texas, 1823-1910*, 9 ECON. & POL. SC. BULL. OF U. OF WIS. 1,22 (1918).

⁹¹*Id.* at 35-36.

⁹²*Id.* at 43-44.

⁹³*Id.* at 45-46.

⁹⁴*Id.* at 49-52.

encourage the construction of artesian wells, irrigation ditches, industries, river improvements, and railroads. An act of 1854 gave railroads 10,240 acres of land for every mile of road constructed.⁹⁵

Most of the money received by the state for the sale of lands went into county and state school funds. In 1830 the state set aside 4,000 acres in each county, the proceeds to go to the county for schools. In 1866 the legislature set up the state school fund. The alternate sections left between railroad sections, the lands forfeited by railroads, and one-half of the vacant public domain that existed in 1876 were reserved from settlement for the school fund. In 1883 the school lands were put up for sale or lease, at a minimum price of from two to five dollars an acre. One section of agricultural land and up to seven sections of pasture land could be purchased. Ranchers could lease land for 10 years in any quantity at 4 cents an acre on a competitive bidding basis.⁹⁶

There can be no doubt that much of the land fell into the hands of speculators, instead of the farmers for whom it was intended.⁹⁷ But the sale and lease provisions that allowed ranchers to obtain large quantities of land enabled the Texas cattle industry to become stable and prosperous. In Texas a rancher was ordinarily able to obtain legal title to enough land to build a strong business. It would seem to have been to the advantage of the Federal government to adopt the Texas system of land sale and lease in preference to the methods it followed in fact.

II. GRAZING LAND LAW REFORMS

Congress commissioned Major John Wesley Powell to study the western lands and make recommendations. His report was published in 1879.⁹⁸ It proposed that unowned public land be divided into sections with as much access to water as possible; that the land be divided into topographical districts;⁹⁹ that the settlers in each district parcel out the land themselves; and that title to water was to pass with title to land. Although his recommendation had no direct effect, they did result in the formation of the United States Geological Survey and the Public Land Commission.¹⁰⁰ The Commission held hearings throughout the West concerning proposed changes in land laws. The Commission made several recommendations as a result of the hearings, but no action was taken by Congress.¹⁰¹

⁹⁵*Id.* at 53-54,70.

⁹⁶*Id.* at 92-96

⁹⁷*Id.* at 152.

⁹⁸Wash. D.C., Gov't. Ptg. Off., 1879. See also POWELL, REPORT ON THE LANDS OF THE ARID REGION OF THE UNITED STATES (Harv. Univ. Press ed. 1962).

⁹⁹Mineral, timber, pasturage, and irrigable. In irrigable districts each settler would be limited to 80 acres. In pasturage districts, those for grazing, each settler could have 2560 acres, but could irrigate no more than 20 acres.

¹⁰⁰Congress did set up the United States Geological Survey, with instructions to make topographical classifications of the United States, and the Public Land Commission, to codify existing land laws and recommend changes in the survey system and methods of land disposal.

¹⁰¹H.R. EXEC. Doc. No. 47, 46th Cong. 3rd Sess. pt. 4 (1880-81).

By 1884, pressure for a leasing system began to develop.¹⁰² At the National Cattle Growers' Convention at St. Louis, the ranchers passed a resolution urging Congress to enact laws that would enable the western cattlemen to acquire by lease the right to graze upon unoccupied lands. The cattlemen felt a leasing program was needed because the industry was big business, requiring large amounts of capital. The large companies were reluctant to invest any more capital into a business which rested its existence upon questionable rights to the use of government grazing lands. The ranges were becoming overcrowded and the cattlemen wanted some legal control over access to the ranges.

Settlers throughout the West opposed any leasing program for cattlemen. They felt that such a program would favor large cattle companies at the expense of small ranchers and farmers whose small herds grazed on the public domain. The large companies, it was felt, would fence the leased land, thus cutting off the small ranchers and farmers from the use of the public lands. In addition, existing companies and ranchers who received leases in an area would have a virtual monopoly because no new ranchers would be allowed in an area which was already fully leased. Finally, it was felt that this program of government regulation might be a source of official corruption.

The federal government supported the position taken by the settlers, and took no action on the proposals.¹⁰³ In 1885 a new Land Commissioner was appointed, who attempted to vigorously enforce the existing laws.¹⁰⁴ He was handicapped by a lack of sufficient investigators, and in addition aroused hostility in Congress by his zeal; as a result he was forced to resign in 1887.

Although the executive officers of the Land Department were able and literate, they were handicapped by insufficient funds and a lack of new legislation. Congress represented the East and Middle West, and knew little or nothing about the range cattle industry. Consequently, it had no motivation to act nor knowledge as to how it should act.

After the hard winter of 1886-1887 the cattle industry cut back and began to stabilize and recover from the boom years. The quality of stock was improved, and cattle could not be left to roam on the range. They had to be protected and fed, and consequently less land was needed than before.¹⁰⁵ The range aspect of the cattle industry decreased in importance for a variety of reasons not connected with the federal land laws. The requirements of the industry dictated stable business practices. Thus

¹⁰²CLAY, *MY LIFE ON THE RANGE* 116, 236 (1962); PELZER, *THE CATTLEMAN'S FRONTIER* 94-96 (1936). OSGOOD, *THE DAY OF THE CATTLEMAN* 200 (1929). Joseph Nimmo estimated that a leasing system would have yielded ten to fifteen million dollars to the federal government. See H.R. EXEC. DOC. No. 267, 48th Cong., 2nd Sess. 47 (1884-86).

¹⁰³H.R. EXEC. DOC. No. 267 *supra* note 102, at 47-49.

¹⁰⁴U.S. GENERAL LAND OFFICE, *ANNUAL REPORT OF THE COMMISSIONER* 50, 67 (1885).

¹⁰⁵OSGOOD, *op. cit. supra* note 103, at 232-33.

the ranchers slowly abandoned the extra-legal practices they had used to acquire and control grazing lands.¹⁰⁶

III. THE ENACTMENT OF RANCHING NEEDS AND CUSTOMS INTO LOCAL LAW

The customs and practices developed by ranchers to meet the needs of the cattle industry concerned more than land control. In fact, cattlemen were often more effective in getting enacted into local and state law customs concerning the movement and identification of cattle, the policing of the range, and the organization of the industry.

The influence of the stock growers' associations on the laws of the states and territories was considerable. Once associations were strong and fully operational they considered it their duty work for the most favorable legislation possible. For instance, in Texas the penalty for ordinary theft of property worth less than fifty dollars was up to two years imprisonment. But for theft of a cow, usually worth under fifty dollars, the penalty was two to four years imprisonment, and five to fifteen years in the state penitentiary for theft of a horse. Other laws that associations were usually instrumental in getting passed were the brand recording statutes, animal inspection and health laws, and laws penalizing anyone allowing an inferior bull to run at large.

In spite of the associations' attempts to influence legislation, it should be remembered that the associations were primarily organized for economic reasons and their most effective activities involved the control of the cattle industry. They fill the gap left by ineffective state governments. The associations exemplify how a new industry could take immediate steps to protect and police itself. They were and have continued to be so successful that the cattle industry is relatively unregulated by state and federal governments today.

A. LAW OF THE ACCUSTOMED RANGE.

During the period of the Long Drive independent drovers frequently bought herds from ranchers to drive to market. The drover or ranchers would round up the number of cattle contracted for without regard to brands, all of which were listed before the drive. If some of the cattle rounded up by the drover had no brand at all, the drover was under no necessity to divide the profits they brought at market with the other ranchers, as he had to for branded cattle.¹⁰⁷

To meet this difficulty the Texas legislature established the principle of the accustomed range, one of the most original laws invented in the Great Plains to meet the needs of the cattle industry. Passed in 1866¹⁰⁸ the law made it a felony for anyone wilfully to drive any livestock that

¹⁰⁶TURNER, *THE FRONTIER IN AMERICAN HISTORY* 343-44 (1950).

¹⁰⁷OSGOOD, *op. cit. supra* note 103, at 32-33, 118.

¹⁰⁸Tex. Gen. Laws, 11th Legis. Sess., ch. 149, 187-88 (1866).

did not belong to him and without the owner's consent of its "accustomed range." The law labeled such an act theft¹⁰⁹ and attached to it a two year jail sentence or one thousand dollar fine. The law did allow persons to drive stock not their own with their own stock until the stock could be conveniently separated but not off their usual range. In an 1875 case where the defendant had been sentenced to two years in jail for driving two cattle off their accustomed range during a roundup, the court held that it was error to exclude from the jury evidence that the defendant claimed he owned the cattle.¹¹⁰ The case was remanded.

Every state with any stake in the cattle industry passed an almost identical law.¹¹¹ Some states accompanied the accustomed range law with one making it the duty of a drover passing through an area with a herd to keep his herd separate from resident cattle or to pay damages. Only Colorado did not attach a jail sentence to violation of the act but made the offending party liable for treble damages.¹¹² An interesting Colorado case¹¹³ defined the limits of an accustomed range in a case in which the defendant had driven the plaintiff's cattle across the public domain away from the defendant's range but not actually out of the area. The court awarded the plaintiff damages and said: "Willful driving to any material extent from public domain within such territory to another locality, within or without such territory, is driving from their usual range."¹¹⁴

These laws meant that a rancher was able to establish property rights in his unbranded cattle simply because they ran on his range.

B. FENCE LAWS

During the days of the open range cattle were so important to ranchers that they were allowed to roam everywhere. It was often difficult to secure ordinances in towns to keep cows off the street. Sixteen years after Denver was settled and had a population of 20,000, cattle still roamed the streets. Finally, in 1874 an ordinance was passed prohibiting their exhibition on the streets and providing for their impoundment, similar to today's dog pounds.¹¹⁵

For years cattle were allowed to roam at will. Even today the common law rule that the owner of stock was strictly liable for all its trespasses and had to keep it enclosed, is not the general rule in the cattle states. And there was good reason for abrogation of the common law

¹⁰⁹See *James A. Counts v. State*, 37 Tex. 593 (1872-3).

¹¹⁰*Frank Darnell v. State*, 43 Tex. 147 (1875).

¹¹¹ARIZ. REV. STAT. § 3000 (1901); MONT. PENAL CODE, 1895, §§ 1185-1187; NEV. COMP. LAWS §§ 4884-4885 (Cutting, 1900); N. MEX. COMP. LAWS §§ 59-60 (1884); N. DAK. REV. CODES §§ 1544-49, 7508 (1895); Wyo. Laws, 3rd Legis. Sess., ch. 50, § 3 (1873).

¹¹²COLO. ANN. STAT. §§ 4261-4262 (Mills, 1891).

¹¹³*Richards v. Sanderson*, 39 Colo. 270, 89 Pac. 769 (1907).

¹¹⁴*Id.* at 277; See also *Hecht v. Harrison*, 5 Wyo. 279, 40 Pac. 306 (1895).

¹¹⁵PAKE, THE COLORADO RANGE CATTLE INDUSTRY 171 (1937).

rule. A Colorado judge wrote eloquently of the range conditions in 1880 which justified the lack of restriction:

These commons and numerous parks in the mountains furnish excellent grass for horses, cattle, and other animals, and stock raising, in consequence, has become one of the leading industries of the State. The returns from the several counties show that there were in 1880 more than one and one-half million cattle, horses, mules and other domestic animals liable to taxation in the State. This industry would be seriously crippled by the adoption of a law requiring each owner to keep his stock within his own close. It would be impracticable, as well as impossible, for the several owners of these animals to inclose suitable pasture for their herds. Nor is there any necessity for such a rule. The commons are now owned principally by the State and by the general government, and if the grasses which grow thereon are not depastured, they will waste and decay. And while it is impracticable to purchase and fence sufficiently pasture lands for the stock, the tillage and meadow lands can be fenced, and, in point of fact, are now inclosed in nearly all parts of the state.¹¹⁶

Thus, the rule in the western states was that animals running at large committed no trespass when they wandered on unenclosed private lands. The states then passed fence laws to placate the farmers who had no remedy against ranchers, whose cattle damaged their crops. The laws defined specifically what constituted a legal fence. For instance, they denominated the material such as barbed wire or wood, the height, length, and number of strands. If a landowner had such a legal fence, and cattle broke through it, then the landowner had a cause of action against the owner of the stock for damages.¹¹⁷ All cattle states passed such laws.¹¹⁸

The case law adhered strictly to the statutes, except where cattle were wilfully driven onto someone else's land to graze. In *Fant v. Lyman*¹¹⁹ a rancher sued a sheepman for the value of his pasturage eaten by the sheep. The court said the plaintiff couldn't collect for the non-malicious trespass of the sheep since he didn't have a lawful fence. In other words, the range was open to grazing animals, and without a fence a landowner was without a legal remedy. In *Big Goose and Beaver Ditch Co. v. Morrow*,¹²⁰ the cattle of the plaintiff fell into the defendant's unfenced ditch. The court quoted the maxim *sic utero tuo ut alienum non laedas* (one must so use his property as to not injure others) and held the defendant responsible.

The United States Supreme Court limited the right of cattle to graze freely on other people's land, if the cattle were driven on the land or wilfully permitted to graze there. In *Lazarus v. Phelps*¹²¹ the plaintiff

¹¹⁶*Morris v. Fraker*, 5 Colo. 425,428-29 (1880).

¹¹⁷Note, *The Open Range: A Vanishing Concept*, 13 WYO. L.J. 136,137 (1958-60).

¹¹⁸ARIZ. REV. STAT. §§ 2651-2653 (1901); COLO. ANN. STAT. §§ 1939-1948 (Mills, 1891); N. MEX. COMP. LAWS §§ 1272-1279 (1884); OKLA. STAT. §§ 189-206 (1893); TEX. REV. STAT. §§ 2431-2435 (1879); WYO. REV. STAT. §§ 4182-4194 (1887); MONT. POLITICAL CODE, 1895, §§ 3250-3259.

¹¹⁹Mont. 61, 22 Pac. 120 (1889).

¹²⁰8 Wyo. 537, 59 Pac. 159 (1899). See also *Smith v. Williams*, 2 Mont. 195 (1874); *State v. Johnson*, 7 Wyo. 512, 54 Pac. 502 (1898).

¹²¹152 U.S. 81 (1894).

owned and the defendant leased adjoining alternate sections of land in Texas. The defendant allowed his cattle to stray from his sections onto the plaintiff's land. The plaintiff sued for the rental value of 176,000 acres. The defendant raised as a defense a Texas statute requiring that the plaintiff have a lawful fence which cattle had broken in order to collect damages. The Supreme Court held for the plaintiff:

As there are, or were, in the state of Texas, as well as in the newer states of the west generally, vast areas of land over which, so long as the government owned them, cattle had been permitted to roam at will for pasturage, it was not thought proper, as the land was gradually taken up by individual proprietors, to change the custom of the country in that particular, and oblige cattle owners to incur the heavy expense of fencing their land, or be held as trespassers by reason of their cattle accidentally straying upon the land of others . . . the trespass authorized, or rather condoned, was an accidental trespass caused by the straying cattle.¹²²

The court held that the statute didn't authorize cattle owners to graze their cattle on another's land for their benefit without payment. Many state courts applied this rule in similar cases.¹²³ But in driving grazing cattle off his land, whether damaged or not, a landowner had to do so carefully, not maiming, abusing or killing the animal, or he was liable to the stock owner for damages.¹²⁴

These fence laws enacted into law the ranchers' custom of allowing cattle to roam. The laws were not easy on the farmers, however. Those who could not afford to fence their cultivated fields were at the mercy of the straying cattle who could destroy their crops overnight.

C. HERD LAWS.

The answer to the farmers' problem was found in the herd law. As more and more farmers settled on the plains they gained power in the legislatures. They were able to persuade the legislatures to pass herd laws similar to those in the Middle Western states. Although the form varied, the laws essentially left it up to the population of each county to decide by vote whether the crops should be fenced and cattle allowed to roam free, as the ranchers wanted, or the cattle should be fenced and crops allowed to go unfenced. If the county or herd district elected the latter alternative, then if the cattle escaped from their enclosure and damaged unfenced crops, the owner of the stock was liable for damages.

By 1900 every western state except Colorado, Montana and Wyoming, had passed a law setting up some form by which the population of a county could decide which option it desired in that county.¹²⁵ And

¹²²*Id.* at 85

¹²³*Monroe v. Cannon*, 24 Mont. 316, 61 Pac. 863 (1900); *Cosgriff Bros. v. Miller*, 10 Wyo. 190, 68 Pac. 206 (1901); *Martin v. Platte Valley Sheep Co.*, 12 Wyo. 432, 76 Pac. 571 (1904); *Haskins v. Handrews*, 12 Wyo. 458, 76 Pac. 588 (1904).

¹²⁴*Addington v. Canfield*, 11 Okla. 204, 66 Pac. 355 (1901).

¹²⁵ARIZ. REV. STAT. §§ 2654-2663 (1901); N. DAK. REV. CODES §§ 1550-1565 (1895); OKLA. STAT. §§ 178-188 (1893); 8 Tex. Laws at 1131 (Gammel, 1822-1897).

even Colorado allowed some counties to require cattle be fenced by special legislation. The New Mexico law was also unusual. A different rule was enacted for almost every county in the state, but generally the crops had to be fenced before ranchers had to pay for damage by their stock.¹²⁶

A typical law did not make it easy to vote the cattle into enclosures. Usually the county commissioners were authorized by the state law to divide the county into districts. In the districts cattle were allowed to roam at large, unless a majority of the population of the county petitioned the commissioners to hold an election in which it would be decided whether the crops or the cattle were to be fenced. So if a majority of the population in the county was not farmers, the cattle were automatically allowed to roam at large, no matter how much damage they did to crops. The crops simply had to be fenced.¹²⁷

The laws generally presented a workable solution to the farmers' problem, however. For instance, when the Texas law leaving the fencing question open to county option was passed, eastern Texas counties promptly adopted rules requiring the stock to be fenced because the area was dominated by farmers. Western Texas clung to the open range system at the ranchers' option.¹²⁸ The latter rule did not encourage settlement in West Texas, but in each area the will of the majority dominated and most were satisfied with this solution.

CONCLUSION

It is a working assumption among lawyers and historians that the laws enacted by legislatures in the United States are: (1) the formalizations of practices of the population, (2) the result of pressure by the population for a law it needs, or (3) a specific prohibition of a practice of the population. It is a working assumption because very little research has been done to discover why laws were enacted in the past. Usually the purpose behind a law is reasonably clear from its provisions. As to national laws, the legislative history is relatively complete. In the states this is not true. Laws are enacted and remain in force sometimes for years for no identifiable reason. It was the purpose of this study to examine the effect of one industry during a specific period in American history on the land laws of the states in which it was strongest.

The American cattle industry is unique in American history. It was born of the American frontier, where no other large American industry was ever born. From its inception its influence on the law-makers of the western states has been considerable. Because the industry developed and was strong before the law making and enforcement agencies of those states were developed, it made its own law. The participants in the

¹²⁶N. MEX. COMP. LAWS §§ 80-87 (1884); N. MEX. LOCAL & SPECIAL LAWS at 88,258, 264, 270, 274, 288, 308 (1884).

¹²⁷For a good description of the operation of herd laws see Board of Com'rs of Washita County v. Haines, 4 Okla. 701, 46 Pac. 561 (1896).

¹²⁸WEBB, *op. cit. supra*, note 67, at 284.

industry learned how to take and hold the grazing land they needed by a system of dividing land according to range rights, by controlling the land by water rights or by force, by taking land first and possessing it physically. They policed their industry and protected their product—cattle—by means of associations. They developed practices such as branding and roundups to protect their product as private property.

When the participants in the cattle industry could no longer operate under the rules they had made and enforced, they attempted and for the most part succeeded in persuading state legislatures to enact their needs into positive law. Alexis de Tocqueville described the spirit with which the cattlemen approached frontier legislatures:

Democratic ages are periods of experiment, innovation, and adventure. At such times there are always a multitude of men engaged in difficult or novel undertakings, which they follow alone, without caring for their fellow-men. Such persons may be ready to admit, as a general principle, that the public authority ought not to interfere in private concerns; but by an exception to that rule, each of them craves its assistance in the particular concern on which he is engaged, and seeks to draw upon the influence of the government for his own benefit, though he would restrict it on all other occasions.¹²⁹

The ranchers sought the benefit of the legislatures and received it. The common law regarding liability for damage done by roaming animals was specifically rejected, and laws were made requiring farmers to enclose their fields in order to have a cause of action at law for damage to crops. The herd and estray laws of the Middle Western states were adopted and adapted to suit the ranchers' needs. Quarantine and non-resident taxing laws were used to preserve the ranges in a state for the cattle of resident cattlemen. Thus, the cattle industry did affirmatively influence the laws of the states.

Finally, if there was no other way to preserve the needs of the cattle industry, the participants ignored or disobeyed positive laws that did not conform to those needs. Primarily cattlemen violated federal land and fencing laws in order to acquire enough land to raise cattle at a profit. Federal policy was to allow grazing on the public domain, as long as ranchers neither prevented settlement on that land or fenced the land. In order to hold enough land, ranchers violated both prohibitions. They fenced large parts of the public domain, and they devised many intriguing means of discouraging settlers from coming on their public domain, from driving them off the land at gun point to fencing them in completely.

As a result of these violations of the federal land laws by ranchers, the lands occupied by them became their private property for all practical purposes. Land was handed down for several generations in families that remained in the cattle industry. So strong did the private interests in the public domain become that in 1934 Congress enacted a law

¹²⁹ Tocqueville, *DEMOCRACY IN AMERICA* 362 (1862 ed.).

that perpetuated the occupants' rights in the public domain by legal right. In other words, in the Taylor Grazing Act¹⁸⁰ Congress recognized and bowed to the private interests that had grown up in the prior seventy years. It gave the occupants of the land at the time of the passage of the act the right to remain on that land and use it. The act was the first ever passed by Congress to regulate grazing on the public domain. It sets up a lease system to be administered by local ranchers in each area. Leases can rarely be revoked and can be bought and sold in conjunction with the sale of adjoining private property. In the end, even as to the public domain, the practices of the cattlemen have been perpetuated by law.

Much of the law of this country is after the fact. The history of the cattle industry was a useful institution through which to prove this thesis because it became a million dollar industry before there was any law in the areas where it developed. Its influence on state and federal law is clear cut.

¹⁸⁰48 Stat. 1269 (1934).

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